



MEMORANDUM

TO: Mayor and Council Members

FROM: Toby Hammett Futrell
Assistant City Manager

DATE: July 18, 1997

SUBJECT: Proposal For Renovation of State Theater

The following information has been prepared by staff to provide you with a status report and recommendation on how to proceed with the State Theater renovation project authorized by the voters in 1985. Included in this document is a brief history of the project, as well as an outline of the proposal that is being prepared for Council consideration this summer.

The City Council last considered this issue in June 1994. The **ownership provision** of this proposal differs from the proposal that was presented in 1994. **New Council action is required** to authorize negotiation and execution of a contract to renovate the State Theater based on this proposal.

SUMMARY

In 1985, City of Austin citizens authorized the sale of over \$20,000,000 in bonds for three cultural arts projects, including a downtown art museum and renovation of performing arts facilities. The State Theater was one of two performing arts facility projects identified for renovation by these funds. One of the performing arts projects, Zachary Scott Theater, is complete and the downtown art museum project is underway. Although 63% of voters approved the funds, the State Theater project remains uncompleted.

Could the bond dollars linked to the State Theater project be spent elsewhere? This is a question that has been reviewed many times over the last ten years. Prior to the 1985 bond election, information was distributed to the public that three projects were planned under the proposition. Those three projects were outlined in the ballot language. Language for Proposition No. 2, as well as the ballot language follows:

“THE ISSUANCE OF \$20,285,000 TAX SUPPORTED GENERAL OBLIGATION BONDS FOR CONSTRUCTION OF A PUBLICLY OWNED ART MUSEUM ON DONATED LAND DOWNTOWN AND THE RENOVATION OF PERFORMING ARTS FACILITIES.”

“Funding will provide three local cultural organizations funding support to build and renovate facilities. Laguna Gloria will use \$14.7 million to build a downtown art museum. Zachary Scott Theater will use \$3.5 million to expand the current facilities to provide additional space for the performing arts. Include in this expansion is a children’s theater, classroom/rehearsal space, office/box office space, increased costume shop and lobby space and additional parking. Additionally, \$2 million will allow the Paramount Theater to lease and renovate the State Theater next door. The renovated Theater will be used to supplement existing rehearsal and performance space. Passage of Proposition No. 2 will increase the property tax rate 1.5 cents to 1.75 cents per \$100 valuation.”

Here, the ballot language is more restrictive than the language of the proposition. However, as a general rule the language of a proposition controls over the ballot language.

Although no restrictive ordinance or other official action was taken by the City Council to limit expenditure of the bond proceeds to the projects identified in the ballot language, a legal argument can be made that the ballot language and the information distributed prior to the election constituted binding representations that the bond funds would be used for the described projects. Any pre-election representations, made by or on behalf of the City Council and relied upon by the voters, could modify, expand or limit the purposes specified in the ballot. According to a 1992 opinion from the Law Department, proponents of the projects could attempt to convince a court that the ballot language and other representations amounted to a pledge as a basis on which to enjoin an expenditure of the funds for other projects.

Should the City nonetheless desire to redirect the bond funds to another project, the City should first file suit to validate the new intended uses of the bond funds to minimize potential litigation. Article 717m-1 under Texas Revised Civil Statutes authorizes such a suit to forestall disruptive litigation in the use of bond funds. A bond validation suit would seek judicial validation of the use of the bonds for the purposes set forth in Proposition No. 2 that are not included or the same as the purposes set forth in the ballot. A resolution passed by Council on December 14, 1989 directs that such a lawsuit be filed before any of the State Theater bond funds are used for an alternative project.

It is important to note, that a bond election proposition failed in August 1992 that was designed to allow spending flexibility for the unexpended proceeds of the 1985 bonds originally authorized for renovation of performing arts facilities. According to the City's bond counsel, this is another factor that would be considered during a bond validation suit.

Clearly we cannot predict the outcome of such a bond validation suit. The ruling would depend on the evidence, if any, provided to the voters prior to the election relating to the intended use of the bond proceeds and on the extent to which changed circumstances or substantially similar benefits to the voters would justify a different use of the bond proceeds.

In summary, Council has three basic options, including:

1. Council can find and fund an alternative performing arts project, with a strong staff recommendation to file a bond validation suit first.
2. Council can take action to abandon the State Theater project and use all uncommitted bond funds for debt defeasance.
3. Council can stay the course and take action on a new proposal to renovate the State Theater.

Why does the State Theater Project remain uncompleted? In looking for a way to move the State Theater project forward, a wide variety of options were analyzed with an eye to past barriers and within the context of our current environment. Past barriers, some of which are no longer relevant, include problems associated with:

- Economic crash of the mid-80s
- Local arts conflicts over access to funding and diversity
- Condition of building, including asbestos remediation
- Ownership of building, including issues of:
 - Adequate remedies in case of performance default,
 - Sufficient public benefit to warrant public funding, and
 - Bond language that ties expenditure of funds exclusively to facility **renovation**, precluding use of funds for facility **purchase**

What is the current recommendation? Over the last few months, City staff and representatives of Live Oak Theater have agreed on the parameters of a proposal to achieve the intent of the bonds authorized by Austin citizens in 1985.

Our proposal creates a public-private partnership with Live Oak Theater designed to leverage the remaining 1985 bond funds of \$1,914,230 with private resources to pay off the mortgage, renovate and operate the State Theater as a self-sufficient performing arts facility to serve the public and City arts groups.

PROJECT HISTORY

On January 19, 1985:

Voters approved Proposition No. 2 for “the issuance of **\$20,285,000** in tax-supported general obligation bonds for construction of a publicly-owned art museum on donated land downtown and **the renovation of performing arts facilities.**” At that time, education materials were disseminated to the public about the bond proposition that indicated the City planned to use the funds for building or renovating three specific facilities, of which:

- \$14.7 million** was linked to Laguna Gloria to build a publicly-owned art museum on donated land downtown

- ❑ **\$3.5 million** was intended to expand the Zachary Scott Theater providing additional space for a children's theater, classroom and rehearsal space, office and box office space, costume shop and lobby space, and parking
- ❑ **\$2.0 million** was linked to the Paramount Theater to renovate the State Theater, supplementing existing community rehearsal and performing arts space

On June 13, 1991:

Former Council Member Dr. Urdy sponsored an agenda item to allocate \$2,000,000 of available bond proceeds to the State Theater project with the condition that the facility be owned by the City. The item passed as Ordinance No. 910613-K.

In August 1992:

A bond election proposition failed that was designed to allow spending flexibility for the unexpended proceeds of the bonds originally authorized in 1985 for renovation of performing arts facilities. The failure of Proposition No. 14 is significant because it would have allowed the proceeds to be used for purchasing or constructing a facility, while the original proposition language limits the use of these remaining funds for renovation purposes only. Additionally, Proposition No. 14 would have validated the use of these bond funds for an alternative performing arts project. The specific language of Proposition No. 14 is as follows:

“Authorizing expenditure for purchasing, constructing, improving, equipping and renovating facilities for cultural arts or performing arts or both, and acquiring land and interest in land and property necessary therefor, of \$1,968,132 unexpended proceeds of bonds previously issued pursuant to Proposition No. 2 approved by the voters on January 19, 1985 (such bonds having been originally issued for the renovation of performing arts facilities).”

In March 1994:

The City of Austin sought proposals from interested individuals and organizations for the renovation of the State Theater into a performing arts facility. An emphasis was placed on soliciting proposals that leveraged public funds with private resources to renovate and operate the State Theater as a performing arts facility. The public benefit of this proposal was the provision of affordable rehearsal and performance space for small and minority artists. Six proposals were issued and two proposals were ultimately received. The Paramount Theater did not propose, but collaborated with and endorsed the Live Oak Theater's proposal. Live Oak

Theater was evaluated as the best proposal, partially due to a 15-year track record of financial and artistic success.

On June 23, 1994:

The City Council passed a resolution authorizing the negotiation and execution of a contract with Live Oak Theater to renovate and operate the State Theater as a performing arts facility. City cost participation was limited to \$1,800,000 for renovation purposes only, with payment contingent on City ownership of the building. Additionally, City participation was contingent on Live Oak Theater assuming all financial responsibility for future operation and maintenance of the facility, as well as for raising any remaining renovation costs before any commitment of City funds.

On February 1, 1995:

Live Oak Theater signed a lease on the State Theater and the adjoining Reynolds Penland Building, with an option to purchase both buildings. Private donations and earned income were used to begin renovations, including asbestos remediation.

In the Spring of 1995:

Live Oak moved into the State Theater and began to operate it as a performing arts facility.

On November 12, 1996:

Live Oak Theater exercised its option to purchase the State Theater building, concluding a two and a half year effort raising significant capital and expending thousands of staff and volunteer hours to acquire the building. The building was appraised by Urban Property Analysts, Inc. at \$420,000 and the purchase price was \$375,000. The mortgage debt stands at approximately \$290,000.

FRAMEWORK OF PROPOSAL

Two separate components form the foundation of the State Theater proposal.

Renovations and Lease. In the first component of the proposal, the City agrees to pay for the renovations of the facility and Live Oak Theater serves as the project manager for the renovations. Live Oak Theater retains ownership of the State

Theater and the City holds a long-term, non-cancelable lease of the facility for 120% of the remaining life of the bonds to ensure sufficient control over the use of the facility for public benefit.

Facility Management and Sublease. In the second component of the proposal the City subleases the State Theater back to Live Oak to serve as the facility manager, subject to negotiated public use requirements.

Major Features of the Proposal. The actual terms and conditions of the contract remain to be negotiated, but the major features of the proposal are as follows:

Ownership

Live Oak Theater retains ownership of the State Theater, however our proposal is contingent on Live Oak acquiring the unencumbered title to the facility to sufficiently secure the City's investment of bond funds. Live Oak completes an aggressive capital campaign to raise the \$290,000 needed to pay off their mortgage prior to accessing the \$1.9 million in renovation dollars. In fact, the ability to access the bond dollars could serve as Live Oak's fundraising theme.

Long-term Lease to City of Austin

Once Live Oak has unencumbered title to the State Theater, a non-cancelable lease is executed for 120 percent of the remaining life of the bonds. As the bonds mature September 1, 2004, this would be approximately a nine-year lease.

The City of Austin becomes the Lessee and Live Oak Theater, a non-profit corporation, is the Lessor. Remuneration for the lease is the release and expenditure of bond funds for renovations. The City of Austin deposits \$1.9 million in an escrow account upon execution of the lease.

Renovation Project

Live Oak Theater serves as the Project Manager responsible for design and renovation of the State Theater. The City of Austin approves the project design and the project is subject to all state and local bidding and purchasing requirements. Minimal administrative costs of project monitoring by a designated City engineer will be charged against the escrowed bond funds.

Live Oak funds the renovation initially with the proceeds of an interim construction loan. Established draw downs on the escrow account will be tied to negotiated project milestones. Acceptance of the completed renovations by the City of Austin is required before release of the final escrow payment. No public funds beyond the escrowed bond dollars will be expended for project completion.

Sublease Back to Live Oak for Management and Use of Facility

The City of Austin subleases the facility back to Live Oak Theater for 120 percent of the remaining life of the bonds or approximately nine years. Live Oak serves as the facility manager bearing all operations and maintenance costs as remuneration for the sublease. No public funds will be allocated for this purpose beyond those cultural art funds that may be awarded to Live Oak through the City's competitive arts funding process.

During the life of the sublease, Live Oak administers availability and use of the facility subject to negotiated public use requirements in the following four categories:

1. **Rehearsal and Performance Space for Austin Artists.** Live Oak administers a Community Access Policy for 30 percent of the State Theater's availability (including a proportional amount of the prime season and weekends) for other local artists and arts groups on a free or sliding scale basis.
2. **Benefit Performances and Fundraising for Local Non-Profit Organizations.** Live Oak provides benefit performances for a negotiated number of community service organizations each year. Additionally, Live Oak makes the State Theater available for other fundraising events that benefit local non-profit organizations.
3. **Arts Incubator Program.** Live Oak's Arts Incubator Program provides office space, equipment and consulting service during one-year residences aimed at helping new arts organizations and artists in formative stages of development.
4. **Youth Programming.** Live Oak will cooperate with the City of Austin Parks and Recreation Department to provide educational theater opportunities and performing arts experience to local youth.

**City's Right to Cure
Performance Default**

Live Oak Theater and the City of Austin will agree to specific terms and remedies to be incorporated in the long-term lease that allow the City to cure performance default.

CONCLUSION

There are a number of compelling reasons to bring the State Theater project to closure.

The project represents a long over due commitment to the citizens of Austin who overwhelmingly supported funding State Theater renovations in the 1985 bond election. Not only does this project complete a permanent home for Live Oak Theater, it ensures another significant performing arts venue in the heart of our urban core. That venue promises to help mitigate an increasing shortage of rehearsal and performing arts space; fosters the development of local and diverse artistic talent, provides fundraising assistance for community non-profit efforts; and enhances artistic exposure and educational opportunities for our youth.

Additionally, a refurbished State Theater is a strategic step in the City's overall downtown revitalization efforts, providing synergy for other downtown initiatives, as well as adding to Austin's appeal as a tourist and convention destination.

The State Theater proposal will be reviewed by the Arts Commission and the Parks Board in late July and early August. Council consideration is expected in late August. Staff will ask Council for authority to negotiate and execute a contract with Live Oak Theater under the parameters spelled out in this memorandum.

Please do not hesitate to call me at 499-2304 should you have any questions or need additional information.



Toby Hammett Futrell
Assistant City Manager

cc: Don Pierro, Live Oak Theater (Fax #476-4869)
Don Toner, Live Oak Theater (Fax #472-7199)
Jesus Garza, City Manager
Marcia Conner, Assistant City Manager
Jesus Olivares, Parks and Recreation Department, Director
Kendall Moss, Parks and Recreation Department, Assistant Director
Jack Anderson, Cultural Arts Manager